THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2021-0244

Daniel J. Barufaldi

v.

City of Dover

REPLY BRIEF OF DANIEL J. BARUFALDI
APPELLANT

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SUMMARY OF ARGUMENT

The Court should vacate the trial court's dismissal of Mr. Barufaldi's declaratory judgment complaint and remand, holding that Mr. Barufaldi was not limited to certiorari as a remedy, that his claims were not barred by the doctrine of administrative exhaustion, and that declaratory judgment is an appropriate remedy because:

(1) by limiting Mr. Barufaldi to remedies for parties aggrieved by the forum the City of Dover chose, the trial court's ruling wrongly condones the City of Dover hijacking Mr. Barufaldi's case and presenting it to the New Hampshire Retirement System (NHRS) with one-sided argument, ignoring the fundamental principle of law that Mr. Barufaldi was entitled to choose the forum for resolution of his legal issues, based on the principle that the plaintiff has the right to choose the forum in which his issues are decided. Vandam v. Smit, 101 N.H. 508, 509 (1959) ("it is for the plaintiff to choose the place of suit.").

(2) by holding that Mr. Barufaldi could only appeal the decision of an NHRS functionary through a writ of certiorari, the trial court wrongly equated such a functionary's decision with a decision of the board of trustees. Petition of Herron, 141 N.H. 245, 246 (1996) ("The sole remedy available for a party aggrieved by a decision of the board of trustees is a writ of certiorari.")(emphasis supplied).

(3) the trial court's holdings ignore that this case strictly concerns questions of law, specifically questions of statutory and contract interpretation, that constitute questions that a court should decide, not an agency, regardless of the administrative posture. Hamby v. Adams, 117

N.H. 606, 608-09 (1977); Tremblay v. Town of Hudson, 116 N.H. 178, 179 (1976).

Specifically, the case concerns the statutory interpretation question of whether the City of Dover acted illegally by failing to enroll Mr. Barufaldi in NHRS when the City appointed him to the newly created position of Director of Economic Development for the City of Dover on July 27, 2017, because the "option" not to be enrolled in NHRS "shall not be available in the case of…any newly appointed positions created by political subdivisions after July 1, 2011," pursuant to RSA 100-A:3, I (d).

The case further concerns the contract interpretation question of whether the City of Dover was entitled not to enroll Mr. Barufaldi in NHRS based on Section 9.A. of his Employment Agreement stating, "The Employee hereby acknowledges and waives participation in the NH Retirement System **per the requirements and exemptions allowed by State of New Hampshire Retirement System**." Appendix at p. 017 at Section 9.A. Emphasis supplied. In Mr. Barufaldi's case, this purported waiver of participation in NHRS should amount to no waiver at all, because the exemptions allowed by RSA 100-A do not apply to employees such as Mr. Barufaldi employed in newly appointed positions created by political subdivisions after July 1, 2011.

(4) The trial court erred by finding Mr. Barufaldi's claims barred by the doctrine of administrative exhaustion because "[a] party is not required to exhaust administrative remedies where the issue on appeal is a question of law." Porter v. Town of Sandwich, 153 N.H. 175, 178 (2006).

(5) The trial court erred by holding declaratory judgment unavailable as a remedy to Mr. Barufaldi based on a finding that Mr.

Barufaldi somehow does not claim a present legal right, where Mr. Barufaldi does claim a present statutory right to mandatory enrollment in NHRS retroactive to July 27, 2017, based on RSA 100-A:3, I (d).

ARGUMENT

A. The Court Should Vacate And Remand Because Mr. Barufaldi's Allegations Are Reasonably Susceptible Of A Construction That Would Permit Recovery.

This case comes before this Court on appeal from the trial court's grant of a motion to dismiss. In reviewing the trial court's grant of the motion to dismiss, the Court must consider "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." Hobin v. Coldwell Banker Residential Affiliates, 144 N.H. 626, 628 (2000). The Court must "assume the truth of the facts alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to him." Id.

B. The Case Concerns Whether The City of Dover Erred By Failing To Enroll Mr. Barufaldi In NHRS When The City Appointed Him To A Newly Created Position In 2017, Given RSA 100-A:3, I (d).

The trial court erroneously dismissed Mr. Barufaldi's case without reaching the merits of Mr. Barufaldi's case. In essence, Mr. Barufaldi contends that the City of Dover acted illegally by failing to enroll him in NHRS when the City appointed him to the newly created position of Director of Economic Development for the City of Dover on July 27, 2017, because the "option" not to be enrolled in NHRS "shall not be available in the case of…any newly appointed positions created by political subdivisions after July 1, 2011," pursuant to RSA 100-A:3, I (d). Mr.

Barufaldi further contends that the City of Dover is wrong in its position that it was entitled not to enroll him in NHRS based on Section 9.A. of his Employment Agreement stating, "The Employee hereby acknowledges and waives participation in the NH Retirement System **per the requirements and exemptions allowed by State of New Hampshire Retirement System**." Appendix at p. 017 at Section 9.A. Emphasis supplied. In Mr. Barufaldi's case, this purported waiver of participation in NHRS amounts to no waiver at all, because the exemptions allowed by RSA 100-A do not apply to employees such as Mr. Barufaldi employed in newly appointed positions created by political subdivisions after July 1, 2011.

C. The Trial Court Erroneously Dismissed Mr. Barufaldi's Case, Citing Certiorari As The Sole Remedy And The Administrative Exhaustion Doctrine.

The trial court erroneously dismissed Mr. Barufaldi's declaratory judgment complaint, holding that Mr. Barufaldi could not pursue a declaratory judgment action because certiorari was his sole remedy and because he was required to exhaust administrative remedies. The trial court's holdings are based on the following facts: (1) the City of Dover presented Mr. Barufaldi's claim to NHRS on July 30, 2020, advising NHRS by a 3-page submission that the City disputed Mr. Barufaldi's claim and presenting its argument that Mr. Barufaldi had waived participation in NHRS, without presenting any counterargument from Mr. Barufaldi; and (2) an NHRS Member Account Technician issued an August 4, 2020, letter accepting the City of Dover's position.

The trial court's dismissal of the case is wrong for at least five (5) reasons.

First, by limiting Mr. Barufaldi to remedies for parties aggrieved by the forum the City of Dover chose, the trial court's ruling wrongly condones the City of Dover hijacking Mr. Barufaldi's case and presenting it to NHRS with one-sided argument, ignoring the fundamental principle of law that Mr. Barufaldi was entitled to choose the forum for resolution of his legal issues, based on the principle that the plaintiff has the right to choose the forum in which his issues are decided. This case never belonged before the New Hampshire Retirement System (NHRS) and only landed there because the City of Dover brought the parties' dispute before NHRS. It is axiomatic that "it is for the plaintiff to choose the place of suit." Vandam v. Smit, 101 N.H. 508, 509 (1959). Here, by contrast, the City of Dover brought the parties' dispute before NHRS concerning whether the City owed a mandatory obligation to enroll Mr. Barufaldi in NHRS retroactive to July 27, 2017—by faxing three (3) pages to NHRS on July 30, 2020, including the City's disagreement with Mr. Barufaldi's request to purchase service credit, together with a letter from the City (on which the City did not contemporaneously copy Mr. Barufaldi) stating the City's position that Mr. Barufaldi had waived participation in NHRS. Appendix at pp. 041-043.

Not only did the City choose to have the issue decided by NHRS, but the City only presented NHRS with arguments supporting the City's position. Id. Nothing in the record indicates that Mr. Barufaldi had any opportunity to include a position statement in the City's submission to NHRS. Indeed, the reasonable inference required under the motion to dismiss standard of review is that Mr. Barufaldi had no such opportunity,

particularly given the Complaint allegation that Mr. Barufaldi's supervisor, City Manager Joyal, "reproved Mr. Barufaldi for contacting the New Hampshire Retirement System," in response to the City Manager learning that Mr. Barufaldi had made inquiry of NHRS as to whether he was entitled to be enrolled in NHRS. Id. at p. 005 at ¶¶12-13.

The City's choice to bring this dispute to NHRS should not control the remedies available to Mr. Barufaldi to redress the City's violations of RSA 100-A:3, I (d) aggrieving Mr. Barufaldi. Limiting Mr. Barufaldi to such remedies would violate the fundamental principle that the plaintiff has the right to choose the forum in which his case is decided.

Second, by holding that Mr. Barufaldi could only appeal the decision of an NHRS functionary through a writ of certiorari, the trial court wrongly equated such a functionary's decision with a decision of the board of trustees. This Court has never held that the finding of an agency functionary limits a party aggrieved by the finding to certiorari as a remedy. The Court has only held that appeal from a decision of the board of trustees is by way of a writ of certiorari. Hardy v. State, 122 N.H. 587, 589 (1982); Petition of Herron, 141 N.H. 245, 246 (1996).

Third, the trial court's holdings ignore that this case strictly concerns questions of law, specifically questions of statutory and contract interpretation, that constitute questions for a court, not for an agency. The issue that this case concerns—whether the City of Dover owed Mr. Barufaldi a mandatory obligation to enroll him in NHRS when the City appointed him to the Director of Economic Development for the City of Dover position on July 27, 2017—hinges on statutory interpretation of RSA 100-A:3, I (a) and (d) as well as interpretation of Section 9.A. of Mr.

Barufaldi's July 27, 2017, Employment Agreement (Appendix at p. 017). These questions of statutory interpretation and contractual interpretation constitute questions of law. Porter v. Town of Sandwich, 153 N.H. 175, 178 (2006). A court must resolve such questions of law, not an agency--and certainly not a Member Account Technician at the agency. Bel Air Assocs. v. N.H. Dep't of Health & Human Servs., 154 N.H. 228, 232 (2006) ("the proper interpretation of a statute is a question of law for this court to decide."); King-Jennings v. Liberty Mut. Ins. Co., 144 N.H. 559, 560 (1999) ("Interpretation of a contract…is ultimately a question of law for this court to decide.").

Restricting Mr. Barufaldi to certiorari review based on a Member Account Technician's 1-page letter that ignored the legal questions this case presents—failing completely to address the impact of RSA 100-A:3, I (d) on Mr. Barufaldi's entitlement to purchase service credits retroactive to July 27, 2017—ignores the principle that a court should resolve questions of law such as those Mr. Barufaldi's case presents "regardless of the administrative posture." Hamby v. Adams, 117 N.H. 606, 608-09 (1977); Tremblay v. Town of Hudson, 116 N.H. 178, 179 (1976).

Fourth, the trial court erred by deciding this case on administrative exhaustion because it is well settled that a plaintiff need not exhaust administrative remedies when the case concerns questions of law for court resolution. Porter v. Town of Sandwich, 153 N.H. 175, 178 (2006) ("A party is not required to exhaust administrative remedies where the issue on appeal is a question of law rather than a question of the exercise of administrative discretion."). Indeed, it would be nonsensical to require a plaintiff such as Mr. Barufaldi to plod his way through all agency remedies,

when the questions his case presents, involving interpretation of RSA 100-A:3, I (a) and (d) and interpretation of his contract, would ultimately demand court resolution anyhow.

Fifth, the trial court erred by holding that declaratory judgment is not available to Mr. Barufaldi as a remedy because he somehow lacks a "present legal right or title," given the determination of the NHRS functionary. This conclusion is patently wrong because Mr. Barufaldi claims a statutory right, materially distinguishing him from the plaintiffs in cases relied on by the trial court and the appellee. Jaskolka v. City of Manchester, 132 N.H. 528, 531 (1989) (involving a fact question as to whether an employee had "the requisite number of continuous years of city service" to be eligible for prior service credit in the New Hampshire Retirement System); McNamara v. New Hampshire Retirement System, Case No. 2016-0278 (N.H. Jan. 27, 2017) (involving dispute over agency's calculation of retirement benefits). Specifically, Mr. Barufaldi claims a right under RSA 100-A:3, I (d) to enrollment in NHRS retroactive to July 27, 2017, while the City of Dover claims adversely to such right. This case is thus perfectly suited to the declaratory judgment remedy, contrary to the trial court's rulings, given that "[t]he remedy of declaratory judgment is provided for the purpose of making a controversy over a legal or equitable right justiciable…." Jackson v. Fed. Ins. Co., 127 N.H. 230, 232 (1985).

In the appellee's brief, the City of Dover raises arguments in support of dismissal that the trial court failed to address, specifically the primary jurisdiction doctrine and res judicata/collateral estoppel. The trial court declined to address either primary jurisdiction, or res judicata or collateral estoppel below, so arguments on the applicability of these doctrines are

"not ripe for appellate review." Carter v. Liberty Mut. Fire Ins. Co., 135 N.H. 406, 409 (1992).

Regardless, this Court should hold primary jurisdiction inapplicable based on case law declining to apply the doctrine where the Legislature has failed to specify that the agency in question has primary jurisdiction. In Nelson v. Pub. Serv. Co. of N.H., 119 N.H. 327, 329-30 (1979) the Supreme Court rejected the defendant's argument that the district courts lacked jurisdiction to hear a case involving electric utility rates because of the Public Utilities Commission's (PUC) supposed primary jurisdiction. The statute authorizing the filing of complaints with the PUC, RSA 365:1, "contains no reference to exclusive or primary jurisdiction," the Court noted. Id. at 329. By contrast, "the Legislature has established [primary] jurisdiction of other State agencies," the Court observed, noting that "RSA 273-A:6 grants the public employee labor relations board primary jurisdiction of all…unfair labor practices," and that the Legislature has vested "the ballot law commission [with] 'jurisdiction…exclusive of all other remedies' to review written objections filed with the secretary of state concerning primary nominations, nominations by petition, and the filling of vacancies in nominations occurring after the primary." Id. (quotations

omitted); RSA 665:6, III ("The jurisdiction vested in the ballot law commission…shall be exclusive of all other remedies.").

Because the language of RSA 365:1 omitted any reference to primary or exclusive jurisdiction, and was therefore "dissimilar" to the language of both RSA 273-A:6 and the former RSA 68:3 (establishing primary jurisdiction in the PELRB and the Ballot Law Commission respectively), the Nelson Court affirmed the district court's denial of a motion to dismiss based on primary jurisdiction, holding that the PUC's ability to exercise jurisdiction did "not deprive the district courts of their jurisdiction." Id. at 329-30.

Pursuant to Nelson, this Court should similarly hold that the trial court may exercise subject matter jurisdiction over Mr. Barufaldi's claim because RSA 100-A contains no language vesting primary or exclusive jurisdiction in NHRS.

Moreover, even if the primary jurisdiction doctrine applied here (which it does not), the doctrine would not have precluded the trial court from exercising jurisdiction because "[T]he doctrine of primary jurisdiction is discretionary," Frost v. Comm'r, 163 N.H. 365, 372 (2012).

The Court should further hold (if the Court is inclined to address arguments not addressed by the trial court) that neither res judicata nor collateral estoppel applies because the events leading to Member Account Technician Moore's decision did not entail the essential elements of adjudication such as "[t]he right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties." Restatement (Second) of Judgments §83(2)(b). Cook v. Sullivan, 149 N.H. 774, 778 (2003). Moreover, the issue of whether RSA 100-A:3, I (d) entitled Mr. Barufaldi to mandatory enrollment in NHRS retroactive to July 27, 2017, was not "actually litigated" before Member Account Technician Moore, rendering collateral estoppel inapplicable. Id.

CONCLUSION

The Court should vacate the trial court's Orders and remand with instructions for the trial court to issue a declaratory judgment ruling as to whether Mr. Barufaldi is entitled to purchase service credits in NHRS retroactive to July 27, 2017.

STATEMENT OF COMPLIANCE - WORD LIMITATION

I hereby certify that this brief is in compliance with the 3,000 word limitation as set forth in Supreme Court Rule 16 (11). This brief contains 2974 words.

Respectfully submitted,
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Date: November 17, 2021 By: /s/ Benjamin T. King

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being timely provided through the electronic filing system's electronic service to Joshua M. Wyatt, Esq. and Jennifer Perez, Esq.

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